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IN THE

Supreme Court of the United States

October Term, 1959.

No. 157.

JAMES F. KELEHER, *Appellant*,

vs.

LA SALLE COLLEGE, *Appellee*.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

MOTION TO DISMISS APPEAL.

SAMSON B. BERNSTEIN,
JOSEPH E. GEMBALA, JR.,
1706 Market St. National Bank Bldg.,
Philadelphia 7, Pa.,
Attorneys for Appellee.

Martin & Lyle, 1103 Bankers Securities Bldg., Phila. 7, Pa.

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MOTION TO DISMISS APPEAL.

Appellee, pursuant to Rule 16 (b) of the Revised Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal of JAMES F. KELEHER, Appellant, because (a) it does not present a substantial Federal question, and (b) the judgment rests on an adequate non-federal basis.

STATEMENT.

This is a direct appeal from a final judgment of the Supreme Court of Pennsylvania which directed judgment to be entered for Appellee, on appeal from the judgment of the Court of Common Pleas No. 4 of Philadelphia County which entered judgment on the pleadings.

Appellant invokes the jurisdiction of the Supreme Court of the United States under Title 28 U. S. C. Section 1257 (2). Since appellant contends that even though the Supreme Court of Pennsylvania under the Act of May 20, 1891, P. L. 101, Section 2, 12 P. S. Section 1164 (jurisdictional statement pages 4, 5, 19) had powers sufficiently broad to cover the case before them nevertheless that Court had no right to violate appellant's right of due process by denying a jury trial. Under the circumstances appellant should have filed a petition for writ of certiorari as authorized by 28 U. S. C. Section 1257 (3). It is assumed that this appeal will be considered as a petition for writ of certiorari as authorized by 28 U. S. C. Section 2103. In the event that the latter assumption is correct, then it follows that this Motion to Dismiss should be considered as a brief in opposition.

FACTS.

Appellant on September 18, 1953 instituted an action for civil damages arising out of contract, against LaSalle College alleging in his amended complaint that he taught philosophy and religion at appellee college from 1948 to 1953; that in June of 1951 the then president of appellee increased the former salary of appellant to $4,160.00 per year and assigned to him additional duties and gave him "tenure of academic employment"; pursuant to oral contract, that he continued his employment under these amended terms during the academic years of 1951-1952 and 1952-1953; that on March 2, 1953 the new president of appellee terminated appellant's employment; that on March 11, 1953 he was advised in writing that the academic tenure which had been granted to plaintiff by the former president was revoked by the new president and that he no longer enjoyed or had the benefit of academic tenure; that the revocation of academic tenure and termination of employment were a breach of the aforesaid 1951 oral contract of employment, whereby he suffered damages for which the action was instituted.

Appellee's answer filed May 3, 1954 denied the existence of an oral contract and averred that appellant's employment arose solely under two written contracts dated June 15, 1951 and June 15, 1952.

What happened at the trial scheduled for November 6, 1957 is accurately stated in the opinion of Justice B. R. Jones of the Pennsylvania Supreme Court (jurisdictional statement page 16). After lengthy conferences between Court and counsel, it became obvious that the written contract of June 15, 1952, and the alleged oral agreement of June 1951 covered the same subject matter and evidence to sustain the latter was not admissible. As a matter of formality by stipulation of counsel the June 15, 1952 written contract was received in evidence (R. 20a, 21a, 22a), whereupon the motion was granted which ended the litigation in the lower Court (R. 24a). Appellant's evidence

(Letter of March 2, 1953 R. 27a) indicated that the employer-employee relationship was on an academic year basis.

ARGUMENT.

THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS AND THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellant attempts to convince your Honorable Court that he was deprived of his "day in court" when the trial judge prevented him from proving the alleged oral agreement entered into in June of 1951. Appellant contends that notwithstanding the Pennsylvania Parol Evidence Rule, the trial judge should have permitted the issue of the oral contract to go to the jury. Appellant further complains that the proceedings were inartistically conducted and challenges the right of the Pennsylvania Supreme Court to enter its own judgment under the Act of 1891, supra. The words "due process of law" do not necessarily imply a proceeding triable by a jury in every case where personal or property rights are involved. The constitution requires only that there be a hearing being a fair one held before a tribunal which at least meets currently prevailing standards of impartiality. *Wong Yang Sung vs. McGrath*, 339 U. S. 33, 50 (1950).

Neither by intention nor by result has the fourteenth amendment transformed the Supreme Court into a Court of general review to which questions of general justice or equitable consideration arising out of the taking of property may be brought for final determination, and as long as the local tribunal acts in consonance with the constitution, laws and procedure of its own state and as long as said constitution and laws are so interpreted as not to violate due proc-

ess, it is only in exceptional circumstances that the Supreme Court would feel justified in intervening. *Tracy vs. Ginzberg*, 205 U. S. 170 (1907); *Allen vs. Georgia*, 166 U. S. 138, 140 (1897); *Fallbrook Irrig. District vs. Bradley*, 164 U. S. 112, 157 (1896).

The Pennsylvania Supreme Court in the instant case, reported 394 Pa. 545, held at pages 551, 552, that the fundamental issue was whether in view of the written undertaking of June 15, 1952, between the parties, appellant should be permitted to prove by parol evidence the terms of the alleged oral agreement of June 1951 holding that said written contract is free and clear of any ambiguity further holding that:

> "what appellant wants to prove is that, as the result of an oral contract, he acquired academic tenure, by which we understand permanent tenure. That appellant's oral contract did vary and alter the written contract is clear beyond any peradventure of doubt—a comparison of the subject matter of the written contract with that of the alleged oral contract clearly indicates an integration of the latter by the former."

In the Lower Court the complaint filed, failed to aver the execution of the written contracts. If appellant had done so, the complaint would have been clearly demurrable and his case would not have proceeded to the point of even being listed for trial, in the absence of an averment that the subsequent written contract or contracts were entered into by fraud, accident or mistake. The answer to the complaint had attached to it copies of the written contracts and appellant had three and one half years to file an amended complaint attacking said writings if fraud, accident or mistake could have been averred.

Appellant argues (jurisdictional statement page 5) that only after he would have been given the opportunity to testify with respect to the oral contract could appellee be in position to testify as to any written contracts. Having already admitted that he executed the written contract with-

out averring fraud, accident or mistake, to permit him to have proceeded to prove an oral contract antedating, varying and contradicting the written contract would be useless and contrary to law whether of the United States, the State of Pennsylvania and of any other state. 22 C. J. 1248, Sec. 1663, and host of cases there cited. In the case of *Lewis Bokser and Sarah L. Bokser, Appellants vs. Morgan J. Lewis,* 119 Atlantic 2nd 67, 383 Pa. 507, certiorari denied 76 S. Ct. 1031, 351 U. S. 965, 100 L. Ed. 1485, it was held:

> "In Grubb v. Rockey, 366 Pa. on page 597, 79 A. 2d on page 258, supra, we said: 'The Modern Pennsylvania Parol Evidence Rule is well stated by Mr. Justice Stearne in Walker v. Saricks, 360 Pa. 594, 598, 63 A. 2d 9, 10: "This Court said in Gianni v. R. Russell & Co., Inc., 281 Pa. 320, 323, 126 A. 791, 792: 'Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement.' Martin v. Berens, 67 Pa. 459, 463; Irvin v. Irvin, 142 Pa. 271, 287, 21 A. 816. 'All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract * * * and "unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted from by parol evidence".' " Union Storage Co. v. Speck, 194 Pa. 126, 133, 45 A. 48, 49, Vito v. Birkel, 209 Pa. 206, 208, 58 A. 127.' "

Appellant further argues (on the same page) that he should have been permitted to testify and show the **co-existence** of the alleged oral and written contract. His complaint averred nothing not already covered and mentioned in the written contract of June 15, 1952. When the oral and written agreements relate to the same subject matter and are so inter-related that both would be executed at the same time and in the same contract the scope of the oral agree-

ment must be taken to be covered by the writing. *Jordan vs. Sun Life Assur. Co. of Canada*, 1951, 77 Atlantic 2nd 631, 366 Pa. 495; *Gianni vs. R. Russell & Co., Inc.*, 1924, 126 Atlantic 791, 281 Pa. 320; *Colonial Manufacturing Co. vs. Carideo*, 1941, 16 Atlantic 2nd 731, 142 Pa. Superior 485. So that it is shown that there cannot be a co-existent oral contract to the written contract where it would be normal and natural to include the former in the latter.

Appellant (at the bottom of page 5 jurisdictional statement) states that appellant was prepared to present evidence showing that where colleges and universities grant to their teaching staff, tenure of continuing employment, yearly contracts were executed between the parties. It is most vehemently contended that had such an offer been made, it would be objectionable under the rules of evidence as being immaterial and irrelevant, the only issue being as to what happened in this particular case. The record is absolutely devoid of such an offer in evidence and counsel most sincerely decries the making of such an "off the record" argument.

If appellant has been deprived of any property, he cannot complain. It cannot be said that a Court denies due process when on an appropriate hearing it determines that there is evidence to sustain a finding, and a claim that a decision of such nature is erroneous, does not present a Federal question. *Bell Telephone Co. of Pennsylvania vs. Pennsylvania Public Utility Commission*, 1940, 60 S. Ct. 411, 309 U. S. 30, 84 L. Ed. 563. Substantially, appellant was accorded the full protection of the processes of the legal system in Pennsylvania by having his case reviewed first by the lower Court then the lower Court en banc and by appeal to the Court of last resort of Pennsylvania, namely, its Supreme Court. It is respectfully submitted that in determining whether the essential elements of due process were accorded or denied, substance rather than form is controlling, *Alpha Club of West Philadelphia vs. Pennsylvania Liquor Control Board*, 1949, 68 Atlantic 2nd 730, 363 Pa. 53; *Petition of Kariher*, 1925, 131 Atlantic 265, 284 Pa. 455. The

Supreme Court of Pennsylvania by directing judgment for the appellee merely corrected the record so as to reflect the proper result without in anywise creating a judgment contrary to the law.

The constitutional right to trial by jury restrains the lay jury to the limited and special role of determining controverted fact issues, and questions of law, methods of practice, and points of procedure are exclusively the province of the judge. *U. S. vs. Stone*, 59 S. Ct. 1044, 307 U. S. 620, 83 L. Ed. 441, motion granted 60 S. Ct. 1044.

There was no issue of fact for submission to a jury. This litigation is of no importance to anyone else but appellant. It has no bearing on similar undecided cases, public policy, the welfare of the nation nor involve a provocative challenge to our basic law.

It is submitted that the motion to dismiss, be granted.

SAMSON B. BERNSTEIN,
JOSEPH E. GEMBALA, JR.,
Attorneys for Appellee.